



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southeast Regional Office
9721 Executive Center Drive North
St. Petersburg, Florida 33702

July 17, 2000

Mr. Jack V. Ferguson, P.E.
Chief, Permits Branch
Water Quality Protection Division
Environmental Protection Agency, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Dear Mr. Ferguson:

The staffs of National Marine Fisheries Service (NMFS) and Region 6 of the U.S. Environmental Protection Agency (EPA) have conferred on Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) related to issuance of National Pollutant Discharge Elimination System (NPDES) permits. The EFH regulations (50 CFR 600) specify that after discussion with a Federal action agency, the NMFS may make a finding that an agency's existing consultation, coordination, and environmental review processes are adequate, or can be modified, to satisfy EFH consultation requirements. The staffs of our agencies have agreed that EPA's existing NPDES permit issuance procedures, contained in section 402 of the Clean Water Act and its implementing regulations, provide an appropriate mechanism to address EFH consultation requirements.

An existing or modified review process must meet three criteria to satisfy the consultation provisions of MSFCMA regulations. These provisions are: 1) the existing process must provide NMFS with timely notification of actions that may adversely affect EFH; 2) notification must include an assessment of impacts of the proposed action as discussed in Section 600.920 (g); and 3) NMFS must have made a finding pursuant to Section 600.920(e)(3) that the existing process satisfies the requirements of Section 305(b)(2) of the MSFCMA.

Timely Notification

The NPDES permit issuance process, contained in 40 CFR 124 provides the NMFS with timely notification of proposed actions. The EPA's public review and interagency coordination processes provide at least 30 days for public review. When issuing a final NPDES permit decision, a response to all significant comments on the draft permit received during the public comment period also must be prepared.



EFH Assessment

Our staffs have agreed that the fact sheet for the draft NPDES permit, and, if applicable, relevant National Environmental Policy Act (NEPA) documents, could be modified to contain sufficient information to satisfy the requirements in Section 600.920(g). For purposes of an EFH assessment the documents must include: 1) a description of the proposed action; 2) an analysis of individual and cumulative effects on EFH, Federally managed fisheries, and associated species such as major prey species, including affected life history stages; 3) your agency's views regarding effects; and, 4) proposed mitigation, if applicable. The documents may incorporate such information by reference to an EFH Assessment prepared for a similar or related action, supplemented with any relevant new project specific information. Incorporation of information by reference meets EFH consultation requirements provided the proposed action involves similar adverse impacts to EFH in the same geographic area or similar ecological setting, and the referenced document has been provided to NMFS.

Finding

Consultation Initiation

The NMFS finds that the NPDES permit issuance process utilized by the EPA Region 6 can be used to satisfy the consultation requirements of the MSFCMA. Specifically, notification of potential adverse impacts on EFH will occur when EPA sends NMFS the draft NPDES permit issuance documents. The cover letter should indicate that the draft permit issuance documents are intended to initiate EFH consultation, and contain an EFH assessment.

Assessment

The evaluation of EFH impacts will be addressed in the draft permit's fact sheet, and, if applicable, in relevant NEPA documents, in a section or chapter titled "EFH Assessment" or by reference to companion documents, where appropriate. The EFH assessment also may be presented as a separate request for consultation. The evaluation of the effects of the proposed action should include both an identification of managed fisheries and their EFH and an assessment of impacts on those resources. The EFH discussion may reference pertinent information on the affected environment and environmental consequences when they are provided in other sections, chapters, or companion documents.

Coordination

After receiving a draft NPDES permit issuance documents and EFH consultation request, and within the public comment period specified by the EPA, NMFS will submit written comments which will include EFH conservation recommendations, when appropriate. When NMFS identifies EFH concerns, specific measures to minimize or avoid adverse impacts will be contained in a separate section of the response letter. To facilitate the required EPA response (see below), EFH mitigative measures will be specified under a heading within the comment letter entitled "EFH Conservation Recommendations."

Under Section 305(b)(4)(B) of the MSFCMA, Federal action agencies have a statutory requirement to respond in writing within 30 days to EFH recommendations made by the NMFS. If EPA will not be able to issue a final permit decision or other final action within 30 days of receiving NMFS EFH Conservation Recommendations, an interim written response may be provided within 30 days. If an interim response is provided, a detailed written response must be provided to the NMFS at least 10 days prior to final action (e.g., issuance of the final permit decision) being taken.

Higher Level Review

If an EPA decision is inconsistent with NMFS EFH conservation recommendations, NMFS will endeavor to resolve outstanding issues at the regional level whenever possible. However, 50 CFR 600.920(j)(2) allows the NOAA Assistant Administrator for Fisheries to request a meeting with an EPA headquarters official to discuss the proposed action and opportunities for resolving any disagreements.

The overall consultation process is briefly outlined in enclosure 1. Also, to assist you in document preparation, I have included, as enclosure 2, a description of how an EFH assessment might be incorporated in NPDES permit issuance documents prepared by the EPA.

Conclusion

If you agree with the procedures described in this finding, a response letter to that effect is requested. Please contact Mr. Rickey Ruebsamen, the Southeast Region's EFH Coordinator, at 727/570-5317, if you have any questions or wish to discuss this finding.

Sincerely,



Andreas Mager, Jr.
Assistant Regional Administrator

Enclosures

cc: F/SER42
F/SER44
F/HC, Kunkland
GMFMC
FILES

Outline of NMFS - EPA Region 6 Process for EFH Consultation for NPDES Permit Issuance

- ▶ EPA, Region 6 determines that consultation with the NMFS is necessary because an action to be authorized by a proposed permit may adversely affect EFH
- ▶ EPA provides NMFS with a fact sheet, draft permit and, if applicable, relevant NEPA documents
 - ▶ The EPA documents indicate intent to initiate EFH consultation
 - ▶ The EPA-prepared document includes the required components of an EFH assessment (see Enclosure 2)
 - ▶ NMFS is allowed sufficient time to review and comment
- ▶ NMFS provides EFH conservation recommendations, as appropriate, within specified time frames
- ▶ EPA responds to NMFS EFH conservation recommendations
 - ▶ A final response is provided to NMFS within 30 days, or an interim response may be transmitted if final action on the project cannot be completed within that time
 - ▶ Final response is provided to NMFS at least 10 days prior to final action/approval (e.g., issuance of final permit decision)
 - ▶ If NMFS recommendations are not accepted, the EPA response includes a detailed explanation of why NMFS recommendations are not being followed and a scientific justification for any disagreements over anticipated EFH impacts
- ▶ NMFS may seek headquarters-level review of those EPA Region 6 decisions contrary to NMFS conservation recommendations

**Recommended Contents of an EFH Assessment
as Part of an NPDES Permit Issuance Document**

- I. The consultation request transmittal letter should state that the document and information contained therein represent EPA's initiation of EFH consultation. The EFH assessment may be presented as a separate document or integrated into the appropriate sections of the NPDES permit issuance documents, as outlined below.
- II. Description of the proposed action - use existing agency format and requirements
- III. Analysis of effects - EFH assessments can be prepared in a letter or report format, provided the required information [see 50 CFR 600.920(g)] is included, or incorporated in the permit issuance documents in a manner similar A and B, below. The level of detail provided should be commensurate with the anticipated extent of adverse impacts to EFH and Federally-managed fisheries.
 - A. Descriptive information contained in the NPDES document should be expanded to specifically identify Federally-managed fisheries and EFH in the project area. As part of the description of marine, estuarine, or tidally influenced wetland habitats, the text should be supplemented to identify those habitats designated as EFH by the Gulf of Mexico Fishery Management Council, as approved by the NMFS. Where appropriate, Habitat Areas of Particular Concern also should be identified for the project area.
 - B. The discussion of environmental consequences portion of the document should include an evaluation of project and cumulative effects on EFH, EPA's evaluation of those effects, and any mitigation proposed.
- IV. Federal agency views - the EPA Region 6 views regarding EFH impacts can be specified as a part of the "**EFH Assessment**" and/or included and highlighted in the section of the document which presents the agency's conclusions about the anticipated impacts of the subject action.
- V. Proposed mitigation - if mitigation is appropriate and proposed, it should be identified in the "**EFH Assessment**" and described in detail in the section of the document reserved for such discussion. The discussion of mitigation of EFH impacts should be presented separately from the discussion of other proposed mitigative measures.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE
DALLAS, TEXAS 75202-2733

SEP 12 2000

CERTIFIED MAIL: RETURN RECEIPT REQUESTED (7000 0520 0021 8611 3633)

Mr. Andreas Mager, Jr.
Assistant Regional Administrator
National Marine Fisheries Service
9721 Executive Center Drive N.
St. Petersburg, Florida 33702

Re: Essential Fish Habitat Consultation Requirements in Connection with Proposed Reissue of NPDES General Permit No. TXG330000 for Discharges from the Oil and Gas Extraction Point Source Category to Coastal Waters in Texas

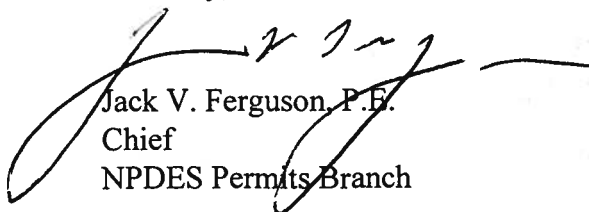
Dear Sir:

The Environmental Protection Agency, Region 6, has reviewed your July 17, 2000, letter concerning the appropriate mechanism for addressing Essential Fish Habitat consultation requirements in connection with the proposed reissuance of NPDES General Permit TXG330000 for discharges from oil and gas facilities to Texas coastal waters. Your letter states that the staffs of our agencies have agreed that EPA's existing NPDES permit issuance procedures provide an appropriate mechanism to address Essential Fish Habitat consultation requirements contained in the Magnuson-Stevens Fishery Conservation and Management Act regulations (50 CFR 600).

You requested that if EPA agrees with the finding that the existing NPDES permit issuance procedure is the appropriate mechanism to address Essential Fish Habitat consultation requirements, EPA should send a response letter to that effect. The purpose of my letter is to inform you that EPA, Region 6, does agree with that finding.

Thank you for the assistance and cooperation in this matter. If you have any questions concerning this proposed permit action please contact Dr. Kenneth Huffman at (214) 665-7504.

Sincerely,



Jack V. Ferguson, P.E.
Chief
NPDES Permits Branch